Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS
AND ADVISERS, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where Congress prescribed in the Cable Communications Policy Act of 1984 a comprehensive scheme allocating the responsibility for regulation of cable television services among federal, state, and local agencies –

(1) Whether Congress delegated to the FCC the authority to curtail local regulatory responsibilities by non-literally interpreting the plain terms of the Act defining the scope of regulation assigned to the local governments and not to the FCC;

(2) Whether the court of appeals erred in affirming the FCC's construction of key statutory definitions so as to allow a significant portion of the cable industry to escape totally any regulation under the Cable Act by any governmental agency.

PARTIES TO THE PROCEEDING and CORPORATE DISCLOSURE STATEMENT

(Rules 14.1[b] and 29.6)

Petitioners are:

National Association of Telecommunications Officers and Advisors (NATOA)
City of East Lansing, Michigan
Charter Township of Meridian, Michigan
Michigan Coalition to Protect Public Rights of Way from Telecommunications Encroachment (PROTEC)
Texas Coalition of Cities for Utilities Issues (TCCFUI)
City of St. Louis
Greater Metro [Denver] Telecommunications Consortium
Alliance for Communications Democracy
Alliance for Community Media
Chicago Access Corporation.

Additional parties appearing before the U.S. Court of Appeals for the Seventh Circuit were:

National Cable Television Association
Michigan Cable Telecommunications Association
City of Chicago
Federal Communications Commission
United States of America
21st Century Telecom Group
Entertainment Connections Incorporated

RCN Telecom Services
Wedgewood Communications.

With three exceptions the joint petitioners are local governments or associations of local governments or government officials. The local governments are franchising authorities as defined in Section 602(10) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 522(10). The Alliance for Communications Democracy, the Alliance for Community Media, and Chicago Access Corporation are non-profit organizations associated with the use of public, educational, and governmental (PEG) access channels provided by cable operators pursuant to local franchises under Section 611 of the Cable Act, 47 U.S.C. § 531. None of the joint petitioners has a parent corporation within the meaning of Rule 29.6.

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OPINIONS BELOW

The decision of the Federal Communications Commission in Entertainment Connections, Inc. (FCC 98-111), released June 30, 1998, is reported at 13 F.C.C. Rcd 14277 and 12 P&F C.R. 800. App. A-27.

The decision of the Seventh Circuit, dated December 7, 1999, in City of Chicago, et al., v. Federal Communications Commission and U.S., No. 98-2729, etc., as amended, is reported at 199 F.3d 424. App. A-1.

The per curiam order of the Seventh Circuit denying rehearing, dated March 22, 2000, is reported at 18 P&F C.R. 1044. App. A-108.

BASIS OF JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 7, 1999, and the petitions for rehearing and rehearing en banc were denied on March 22, 2000. The Court has jurisdiction under 28 U.S.C. § 1254.

STATUTE INVOLVED

This case involves the Cable Communications Policy Act of 1984, 98 Stat. 2779, as amended by the Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1460, and the Telecommunications Act of 1996, 110 Stat. 56. The 1984 Act became Title VI of the Communications Act of 1934, as amended, and has been codified to 47 U.S.C., ch. 5, Subchapter V-A.

Section 601 (Purposes); subsections (2), (5)-(7), (10), (15), (18), and (20) of Section 602 (Definitions), and subsections (b), (c), and (e) of Section 621 (General Franchise Requirements), as amended; and Section 636 (Coördination of Federal, State, and Local Authority) of the Cable Act, 47 U.S.C. §§ 521; 522(2), (5)-(7), (10), (15), (18), and (20); 541(b), (c), and (e); and 556, are printed in the appendix to this petition. In addition, subsection (7) of Section 602, as originally enacted as subsection (6) in 1984, is printed following subsection (7), as amended in 1996.

STATEMENT OF CASE

This case arises from a declaratory ruling by the Federal Communications Commission interpreting one section of the Cable Act in 1984 in disregard of plain meaning in a way that both threatens the regulatory efficacy of the remainder of the Act and radically

affects Congress' allocation of responsibilities among Federal, state, and local units of government in connection with the regulation of cable television.

The 1984 Act Allocated Regulatory Responsibilities. Cable television became a significant factor in the distribution of video programming well after enactment of the Communications Act of 1934, which understandably made no provision for the regulation of the operators of cable television systems. Cable television systems were regulated unevenly by the local franchising authorities, and by the Federal Communications Commission by virtue of its power over television broadcast signals. H. Rpt. 98-934 to accompany H.R. 4103 (The Cable Franchise Policy and Communications Act of 1984) at 19 ff (1984). Feeling that existing regulation was unfairly inhibiting the growth and development of cable, Congress enacted the Cable Communications Policy Act of 1984 "to ... provide and delineate within Federal legislation the authority of Federal, state and local governments to regulate cable systems." Id. at 22; see also Section 601 (Purpose), 47 U.S.C. § 521, particularly subsections (1) and (3), printed at App. A-111.

The thrust of the 1984 Act was protecting cable subscribers, who had access to only a single provider of cable service, while at the same time reducing the regulatory burden on cable operators by rationalizing their regulation at the Federal and local levels. Id. at 23-24. The strategy employed in the Act was to pre-empt all federal, State, and local regulation of rates, services, facilities, and equipment provided by a cable

operator "except to the extent consistent with [the Act]." E.g., Sections 623(a) and 624(a), 47 U.S.C. §§ 543(a), 544(a).

Structure of the Act. The definition of "cable operator" was pivotal in the operation of the Act to the extent that the protection of, and the burdens on, cable by the Act were expressed in terms of effect on the "cable operator." "Cable operator" was defined in Section 602(5), 47 U.S.C. § 522(5), to mean

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

A "cable system," in turn, was defined in Section 602(7), 47 U.S.C. § 522(7), as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community...

with certain enumerated exceptions, one of which is the SMATV (satellite master antenna system) or so-called "private cable" exception that in prior form was

the subject of this Court's decision in FCC v. Beach Communications, 508 U.S. 307 (1993).

One arrangement of particular significance to the viability of the Commission's analysis was the treatment of "channel service" established under prior Commission regulations and recognized in the Cable Act. Under "channel service," a telephone company builds facilities and leases them to cable operators to provide cable service to the home. The Commission has consistently required operators providing cable service via channel service to obtain a franchise.

ECI's Petition. Faced with demands to obtain local franchises from the two municipalities in which it operated, ECI petitioned the FCC for a declaratory ruling that its system providing cable service to twenty apartment buildings in East Lansing and Meridian Township from a single headend[1] was not required by federal law to have a local franchise. Section 621(b) of the Act, 47 U.S.C. § 541(b), enforces Congress' allocation of regulatory responsibility to the localities by prohibiting a cable operator from "provid[ing] cable service without a [local] franchise." ECI had used separate head-ends in each building until it bought

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[1] The prior configuration of ECI's operations, using head-ends in each apartment building, had been held to be subject to franchising under Michigan law. Meridian Charter Twp. v. Roberts, 114 Mich. App. 803, 319 N.W.2d 678 (1982), aff'd on reh'rg, 324 N.W.2d 339 (1982). The Commission disclaimed any intent to rule whether ECI required a franchise or not under state law. Order at ¶ 66 (App. A-86).

wideband transmission service from AMERITECH, the local telephone company, which AMERITECH explicitly advertised as a device for avoiding the federal franchising requirement. The new arrangement was identical in all pertinent respects to channel service, and the local franchising authorities had accordingly demanded that ECI obtain a local cable franchise.

The FCC's Declaratory Ruling. The FCC — over the vigorous dissent of Commissioner Tristani — held that, while ECI was undeniably providing "cable service" within the meaning of Section 602(6), 47 U.S.C. § 522(6), ECI was not a cable operator. The majority reasoned (1) that ECI's system was not a cable system, because it was not wholly owned by ECI within the meaning of Section 602(7), and (2) that ECI was not a cable operator, because it neither owned nor controlled its whole system. In addition, the majority held that ECI's system fell within the SMATV exemption, because the lines laid in the streets to interconnect the apartment buildings were not "using any public right-of-way" within the meaning of Section 602(7)(B). The separate statement of the majority acknowledged that the decision "highlights important issues surrounding dual federal-local jurisdiction under the Communications Act" but said that its result advanced the Commission's commitment to "competitive opportunity". App. A-94.

Recognizing that exempting ECI's system from the Cable Act would open the door for other *de facto* cable operators avowedly providing cable services to

escape regulation, Order at ¶ 3 (App. A-2[illegible]), the Commission purported to limit the sweep of its exemption to so-called "purple cow"[2] systems possessing seven factual characteristics not enumerated in the statute. Order at ¶ 73 (App. A-91).

Commissioner Tristani's dissent charged that the majority's "decision is wrong as a matter of law and misguided as a matter of policy." App. A-95. She first explained why the statutory language did not validate the result reached by the majority. App. A-95-105. On policy grounds the decision, she continued, "upsets the careful regulatory balance struck by Congress in the ... Act" and "undermines the vital franchising role that Title VI reserves for local governments." App. A-106. The majority's departure from the statutory definitions "poses a substantial risk of unintended consequences" and led to her "fear that the majority has opened a Pandora's box" by exempting ECI from regulation under the Cable Act. App. A-95. "Telephone companies, incumbent cable operators and others", she wrote, have already expressed an interest in "artificially restructur[ing] their ownership arrangements to evade Title VI regulation." App. A-107.

The Seventh Circuit's Split Decision. Petitions for review were filed in various circuits by parties to the FCC proceeding, and the cases were consolidated in the Seventh Circuit pursuant to 28 U.S.C. § 2112(a)(5). Cf. order on reconsideration, App. A-8.

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[2] After G. Burgess: The Purple Cow (1895).

The agency order was affirmed by a panel consisting of Circuit Judges Bauer, Rovner, and Evans. App. A-25-26. Writing for the majority, Judge Evans found the Commission's interpretation of Section 602(5) and (7), 47 U.S.C. § 522(5) and (7), to be entitled to deference and "is [the interpretation] which we are now convinced we would arrive at ourselves." App. A-8. Judge Rovner, dissenting, concluded that "the statutory language [is] so plain as to foreclose the FCC's rationale and conclusion." App. A-18.

ARGUMENT

I. THE AGENCY's CONSTRUCTION OF THE STATUTE PRODUCES A RESULT CONGRESS WOULD NOT HAVE INTENDED.

The effect of the Commission's ruling is to exempt a large subclass of wireline cable operators from regulation under the Cable Act of 1984, thus withdrawing regulatory protection from a potentially large body of subscribers to functionally equivalent cable services. Under the Commission's interpretation a cable operator may simply elect, by a sleight-of-hand placing the ownership of a transparent portion of his transmission path in the hand of a non-affiliate — or even an affiliate[3] — to exempt the total operation of his system from regulation under the Cable Act.

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[3] Ignoring the definition of "affiliate" in Section 602(2), the Court in City of Austin v. SWBV, 1998 U.S. Dist. LEXIS 16332, *24 (W.D. Tex. July 31, 1998), aff'd 193

The Commission itself recognized in paragraphs 3 and 4 of its order, App. A-29, the "significant additional consequences" to federal regulation that would attend upon operators such as ECI not being classified as cable operators. They would not be "obligated to comply with the requirements of Title VI of the Communications Act" and the Commission's rules concerning, "*inter alia*, mandatory carriage of television broadcast signals, nonduplication protection and syndicated exclusivity, cable television access and technical standards, and equal employment opportunity requirements," as well as leased access (§ 612) and consumer protection and customer service (§ 632).

But the Commission seemed oblivious to the effect of its order on the regulatory responsibilities consigned by Congress to the local governments under the Cable Act. Lying beyond the Commission's regulatory jurisdiction under the Act, such operators would not be subject to Section 611 and 621(b)(2)(B) allowing local franchising authorities to set aside channel capacity for educational, public, governmental, and other broad categories of video programming and to prohibit redlining of the less lucrative residential areas (§ 621[a][3]).

F.3d 309, n.8 (5th Cir. 1999), cert. denied, 120 S. Ct. 1708 (2000), effectively exempted Southwestern Bell Video from the 1984 Act by reason of its taking video transmission service from its sister-subsidiary Southwestern Bell Telephone Company, thereby rejecting the FCC's first "purple cow" condition. Order at ¶ 73 (App. A-91).

As Commissioner Tristani put it:

> [T]oday's decision undermines the vital franchising role that Title VI reserves for local governments. Under Title VI, local franchising authorities can ensure that the needs of their particular communities are met, such as requiring that all neighborhoods be served and that capacity for PEG access be provided. We should not lightly deprive local governments of the ability to protect their communities in this regard, and certainly not without a fuller analysis than is presented here.

App. A-106.

By effectively exempting functional cable operators from the 1984 Cable Act, the Commission radically diminished the regulatory responsibilities assigned to the local governments under that Act. To whatever extent the Commission may have discretion to forbear regulating cable operators within its *own* regulatory responsibilities under the Act, the Commission lacks delegated authority to reach over the inter-governmental boundary prescribed by statute so as to exempt cable operators from the regulatory authority assigned to the local governments under the statutory scheme adopted by Congress, merely because it believes doing so *might* promote competition. Congress was at least as ardent — and certainly more specific — about the regulatory rôle of the local

franchising authorities than it was about the rôle of competition in regulating the cable industry.

From 1984 to 1996 Congress actually made explicit choices as to the way in which competition would proceed. The radical restructuring of Title VI which the Commission's order indirectly produces is not one that Congress contemplated. As Commissioner Tristani put it in her dissent,

> [T]oday's decision upsets the careful regulatory balance struck by Congress in the Communications Act. The Act establishes several distinct methods for entering the video marketplace, each with its own specific benefits and obligations. Even under the "reduced regulatory burdens" of the open video system ("OVS") model, [23/] Congress imposed various Title VI obligations including must-carry, PEG and the payment of a gross revenue fee to local authorities. ECI, by contrast, will have virtually all of the benefits of being a cable or OVS operator with none of the Title VI obligations. Regardless of how much we want to promote competition in the multichannel video marketplace, we cannot do so by creating loopholes in the regulatory scheme created by Congress.

[23/] *See* S. Rep. 104-230, 104th Cong. 2d Sess. at 177 (Feb. 1, 1996).

App. A-106.

II. THE PLAIN LANGUAGE OF THE STATUTE DOES NOT PERMIT THE RESULT REACHED BY THE COMMISSION.

The interpretations that the Commission and the court below placed on the Act's definitions are not sustainable by reference to the text of the statutory definitions. There is no suggestion that Congress intended that the Commission or the courts elaborate on – and, indeed, contradict – the definitions crafted in Section 602 of the Act. 47 U.S.C. § 522.

The Commission and, in turn, the panel majority reached an incorrect result by in effect reading a non-existent "total ownership" requirement[4] into the definition of "cable operator" and "cable system" in Section 602(5)(A). If a facility is not wholly owned by one entity, the Commission said, it is not a cable system; and, likewise, if it is not owned from end-to-end by a single entity, there is no entity that "owns a significant interest in such cable system" or that can be considered responsible "for, through any arrangement" the "management and operation" of the system. Congress had in mind more functional definitions. The common root of the interpretational errors was a failure to recognize that, for Cable Act

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[4] That is, "owns a significant interest ..., or ... otherwise controls or is responsible for ... such a cable system". Section 602(5) (defining "cable operator").

purposes, ECI delivered cable services over a single unified and dedicated "system," defined as a unitary assembly of facilities in Section 602(7) using the public rights-of-way. The reference to "arrangements" and "significant interest" in the statutory definition of "cable operator," and the absence of a "unitary ownership" requirement in the definition of cable system make it plain that no such "total ownership" requirement was intended.

A. ECI Operated a "Cable System."

In its decision, the FCC concluded that ECI is not a cable operator within the meaning of Section 602(5) because it does not provide service through a cable system. Order at ¶ 61, App. A-80-81. The Act defines a "cable system" as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community....

Section 602(7). As Judge Rovner explained, neither the FCC, nor the panel majority, nor any party to this case has denied that ECI delivers cable service over a facility that have those characteristics. Instead, the FCC found that ECI did not provide cable service over a cable system because the parts of the system owned by ECI and the part owned by the telephone company

"do not constitute a single, integrated" system. Order at ¶ 61, App. A-80. Section 602(7) requires only that the set of closed transmission paths be "associated" with the signal generation, reception, and control equipment. The FCC did not apply the actual language of subsection (7)'s definition of a "cable system" to ECI, and the majority opinion below overlooked this defect in the FCC's analysis.

The panel majority found that the FCC reasonably relied upon seven factors to conclude that ECI did not provide cable service over a cable system:

> (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers.

Op. cit. at A-13-14, quoting Order at ¶ 73, App. A-91. These seven factors do not come from, and are not related to, the statutory definition of "cable system." Instead, most of these factors merely reflect that ECI

does not own the cables located in the public rights-of-way that it uses. But as Judge Rovner so clearly explained:

> The fundamental flaw in the FCC's analysis is that it seizes upon ownership of the transmission lines and elevates that consideration to preeminence in determining whether or not a "cable system" exists. Congress, by contrast, directed the FCC to look at whether there is a set of closed transmission paths and associated equipment that delivers cable service to subscribers; nowhere in the statutory definition did it mention ownership of the transmission paths--or any other particular system component--as a relevant factor.

App. A-21-22.

Moreover, the other factors – the ones that do not concern ownership – editorial control over the programming, the capacity to serve other providers, and ECI's commitment to make its drops available to other programming providers – are not relevant to the statutory definition of a "cable system" either. All the definition requires is "a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service ..." Neither the FCC nor the panel majority applied this definition to ECI's system. Had they done so, they would have been compelled to conclude that ECI does provide cable service through a cable system,

because the system through which it provides service is a set of closed transmission paths with associated signal generation, reception, and control equipment. The Commission simply took it upon itself to rewrite the statutory definition – a power which Congress did not delegate to the agency.

The panel majority did recognize that there is no language in the statutory definition of a "cable system" that makes ownership of the components of that system relevant. App. A-14 ("[I]t is reasonable for the FCC to decline to read the related provisions regarding 'cable operator' and 'cable system' in splendid isolation from one another.") But no other language of the statute refers to a single, integrated system. That concept appears nowhere in the statute. When Congress articulates a standard – here merely requiring signals generators, reception, and control equipment to be "associated" with each other – surely an agency is obliged to apply the statutory test, not one of its own devising. Particularly is this so where the ownership of the system is functionally transparent to the subscriber, who – after all – was the object of concern of the legislative body. See Section 601(4).

The majority's decision ignores the obvious point that neither the statute nor the FCC had ever made unity of ownership the *sine qua non* of franchising. Under channel service, where the facility was owned by a local exchange carrier, the entity providing cable service was required to obtain a franchise; there is nothing in the FCC decision or the decision of the court below that would allow one to

rationally distinguish between the ECI arrangement and a channel service arrangement.

What is worse, and what makes it critical for this Court to review the case, is that factors that the Seventh Circuit majority found critical to upholding the FCC decision, and the factors that the FCC said were critical to its decision, have been rejected by another appeals court in City of Austin v. SWBV, 193 F.3d 309 (5th Cir. 1999), cert. denied, 120 S. Ct. 1708 (2000). But if the factors the FCC exempted ECI from franchising are irrelevant (as the Austin decision suggests), then the obvious conclusion is that the ECI case was wrongly decided.

B. ECI is a "Cable Operator."

Had the FCC applied both the statutory definitions of a "cable system" and "cable operator," the plain language of the statute would have compelled the result that ECI is a cable operator operating a cable system. As we explain above, under the plain language of the Act, ECI provides cable service through a cable system because it provides its service through a set of closed transmission paths and associated signal generation, reception, and control equipment. The Communications Act defines "cable operator" as:

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or

(B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

Section 602(5). While the panel majority found ambiguity in what is required for ownership of a significant interest in or for control or management of the system, App. A-13, the FCC never even purported to be interpreting those terms. None of the FCC's seven factors purports to define either a "significant interest" in a cable system or what amounts to control or responsibility "through any arrangement."

Moreover, as Judge Rovner set forth so well, ECI qualifies as a "cable operator" under both prongs of the definition: it both "owns a significant interest" in the cable system at issue and "controls or is responsible for, through some arrangement, the management and operation of ... a cable system" Section 602(5). See App. A-18-19. ECI plainly owns a significant interest in the cable system through which it delivers cable service to its subscribers. As Judge Rovner noted, it "owns the 'headend,' where the video signals are first received, and at the other end of the system it owns the junction boxes and interior building drop lines whereby the signals are distributed to subscribers in the multiple dwelling units that ECI serves." App. A-19. Judge Rovner succinctly summarized this point: "There would be nothing to transmit over Ameritech's lines (and of course nothing to receive from those lines) absent the system components that ECI owns. In that sense, it defies

logic to characterize ECI's interest as anything but 'significant.'" Id.

In addition, ECI plainly satisfies the second prong of the definition. It has entered into an agreement with AMERITECH to use AMERITECH's fiber optic cables located in the public right of way to deliver cable service form the headend equipment ECI owns to the junction boxes and drop lines it owns. The statutory definition could not be broader — it requires only that ECI control or manage the cable system "through any arrangement." Section 602(5). Plainly, ECI controls and manages the entire cable system — it owns everything but the transmission lines and has an arrangement with AMERICTECH by which it obtains the use of those lines as well. The facilities owned by AMERITECH in the public rights-of-way are transparent to the cable subscriber. As Judge Rovner noted, ECI has assembled components of a functioning cable system by owning a part of it and leasing a part of it. ECI is responsible to its subscribers. It has entered into an arrangement with AMERITECH to secure the use of a strand of cable to deliver its cable service from the locations it specifies to the locations it specifies, and it relies upon AMERITECH to provide the service it needs to operate its system. Provision of this service is not left to AMERITECH's discretion; rather, it is subject to the arrangement ECI has with AMERITECH. Judge Rovner persuasively concludes that "there can be little doubt .... that ECI, is 'responsible' — partly through ownership and party through leasing — for the system that delivers cable programming to its subscribers." App. A-19.

C. ECI's Cable System, being a "Facility" that Uses the Public Rights-of-Way, is Not Within the "Private Cable" Exclusion.

The FCC also failed to apply the plain language of the statute when it concluded that ECI fell within the so-called private cable exemption to the definition of "cable system." Section 602(7)(B) of the Communications Act exempts from regulation as a cable system "a facility that serves subscribers without using any public right-of-way." The FCC concluded that ECI fell within this exemption because it found that AMERITECH, not ECI, installs, repairs and maintains the cables located in the public right-of-way. See Order at ¶ 62, App. A-81. But the statute requires only that the entity "use" the public right-of-way, not that it install, repair, or maintain equipment located in the public right-of-way. And Judge Rovner aptly pointed out that the statute does not even ask whether the cable provider uses the public right-of-way, but rather whether the "facility" uses the public right-of-way. App. A-23. Here the facility that delivers ECI's cable service to its subscribers includes the fiber optic cable leased from AMERITECH, and that portion of the cable system "without question crosses and therefore 'uses' the public right-of-way." Id.

Moreover, ECI itself does use the public right-of-way. Its signal reaches its subscribers by using AMERITECH's fiber optic cable, which lies in the public right-of-way. Judge Rovner explained this point clearly:

> [C]ommon sense tells us that ECI itself also "uses" the public way in delivering cable programming to its subscribers. Quite simply, without access to the Ameritech lines that cross the public way, ECI's signals would have nowhere to go. The lines, certainly, belong to Ameritech, but ECI uses those lines -- and thus avails itself of the public way in which they are located -- no less by leasing the lines than by owning them outright. One can buy a car to drive around town or rent one -- either way one makes use of both the car and the public streets that the car traverses.

App. A-23. As Judge Rovner states, "'use' is a broad term, but its breadth alone does not create ambiguity." App. A-24.

The panel majority asked the rhetorical question of what sort of "use" concerned Congress, and then passed directly to the meaning of "construction": "We think it likely that when the average person thinks of the construction of a cable system, he thinks of the installation of cables, either on poles or underground." App. A-15. The panel majority concluded that because ECI did not construct a cable system over the public right-of-way, it has not "used" the public right-of-way. App. A-16. But, of course, under the statute "construction" is not a relevant concept. Congress did not exempt cable systems that do not construct their cable systems on the public right-of-way, it exempted

cable systems that have a facility that does not use the public right-of-way.

Congress chose a non-technical word with an ordinary meaning to determine whether an entity fell within the exemption to regulations. The word "use" simply does not mean "construct," nor does it mean "own." The FCC is not free to decide for itself that an ordinary non-technical word that Congress chose to use means something different. It must give effect to the language Congress enacted. See, e.g., Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). Judge Rovner made this point succinctly:

> Neither the FCC nor my colleagues seem to dispute that ECI's transmission of signals over the public way through Ameritech's lines constitutes a "use" in the ordinary sense of that term ... (App. A-24); they simply think that there are plausible policy reasons that support construing the term more narrowly. Fine, but the authority to narrow the statute rests solely with Congress. Having chosen a term with an expansive, commonsense meaning, and supplying no definition of its own indicating that the term should be given a more particularized construction, Congress has bound us to the broader meaning of the word. (citation omitted)

App. A-24.

Finally, the panel majority found it irrelevant that the City of Chicago spent "considerable time extolling what they see as the public-interest virtues of widespread local franchising authority over ECI-like SMATV systems." App. A-16. But the point that the City made in its brief was not that franchising was in the public interest -- although, certainly, it is -- but rather that the regulatory scheme enacted by Congress demonstrates that a municipality's interest in a cable system extends far beyond its interest in construction in the public right-of-way. Congress has provided that franchising authorities may require cable operators to set aside channel capacity for educational, public, governmental, and other broad categories of video programming, see Sections 611, 621(b)(2)(B), and the power "to assure that access ... is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." Section 621(a)(3). These powers that Congress granted to franchising authorities show that Congress did not intend that municipalities' regulation of cable systems using the public right-of-way be limited to regulating construction and physical equipment located on the public right-of-way. The FCC may believe that Congress was unwise to grant local governments these substantial regulatory powers, but the Commission's dislike of dual regulation does not grant it leave to create a means by which the regulatory scheme Congress created can be circumvented at will.

To put it another way: not only is the meaning of the terms used by Congress plain, the structure of

the Act indicates that Congress meant precisely what it said. It also means that there is no room within the Act or its legislative history for an agency declaration that effectively eliminates the franchising requirement for potentially large portions of the cable industry. The Commission had tried to implement a regime similar to this one — video dialtone ("VDT"), and Congress explicitly rejected it in favor of a less radical open video system ("OVS") in the 1996 Telecommunications Act. See Section 302(b)(3), 110 Stat. 124.

III. THE COURT BELOW ERRED IN AFFORDING JUDICIAL DEFERENCE TO THE FCC's INTERPRETATION OF THE STATUTORY ALLOCATION OF INTER-GOVERNMENTAL REGULATORY RESPONSIBILITIES.

To the extent the court majority below accorded deference to the Commission's declaratory order restructuring the regulation of cable television, App. A-5, it misapprehended the *Chevron* line of cases on judicial deference. The Commission's interpretation below is not entitled to deference.

The *Chevron* doctrine applies only when a court reviews an agency's construction *of a statutory provision that the agency administers.* Chevron, 467 U.S. at 842. Chevron does not require judicial deference to every pronouncement that an agency makes. This Court has ruled that the courts need not give deference to any agency's construction of a

particular section of a statute unless there has been a delegation of authority to administer that particular section. See Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990), declining to afford deference to an agency's construction of a statutory provision that it did not administer; Martin v. OSHRC, 499 U.S. 144, 154 (1991), holding that agency adjudicative jurisdiction, as here asserted by the FCC, does not give rise to judicial deference, even where deemed "conclusive" under the statute; cf. Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997). This limitation is routinely recognized in the courts of appeals. See, e.g., Professional Reactor Op. Soc. v. U.S. Nuclear Reg. Com'n, 291 U.S. App. D.C. 219, 223, 939 F.2d 1047, 1051 (1991); Air North Am. v. Dept. of Transportation, 937 F.2d 1427, 1436-37 (9th Cir. 1991) (no *Chevron* deference where statute is not assigned special rôle by Congress in construing that statute).

Here Congress did not delegate to the Commission any responsibility to administer the federal requirement that cable operators obtain local franchises in Section 621(b), which gave rise to ECI's petition for declaratory ruling below. This requirement pertains to the duties assigned to the local governments. Even less did Congress delegate to the Commission the prerogative of adjusting inter-governmental boundaries prescribed by statute. This is not a "task [that] has been assigned primarily to the agency created by Congress" and does not "belong[] to the usual administrative routine" of the Commission. Cf. NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944). In the 1984 Act Congress "continued to rely

on local franchising as the primary means of regulation." Time-Warner Entertainment Co. v. FCC, 320 U.S. App. D.C. 294, 300, 93 F.3d 957, 963 (1996) (*per curiam*).

The limited delegation of authority to the FCC is inherent in the particular structure of the 1984 Act. The Act allocates regulatory responsibilities *amongst* the federal, state, and local governments, but it does not delegate regulatory authority *to* the state and local governments. The Act recognizes and limits their exercise of prior-existing authority under state law. Id. It merely "clarifies the current system of local, state and Federal regulation of cable television." H. Rpt. 98-934 at 19 (1984). The Commission is not the sole implementing agency under the Act. There are many sections of the Act with respect to which the FCC has no legislative or adjudicatory authority whatsoever.[5]

Congress having addressed the boundaries of local authority in the 1984 Act, there is no basis for agency curtailment of local authority. Cf. Cipollone v. Liggett Group, 505 U.S. 504, 517 (1992). Moreover, in Section 636 (Coordination of Federal, State, and Local Authority) of the Act, 47 U.S.C. § 556, Congress deliberately limited any pre-emption of non-federal authority to the express provisions of the Act.

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[5] See, e.g., Sections 622(a)-(c), (e), (f) (General Franchising Requirements), 625 (Modification of Franchise Obligations), 626 (Renewal), 627 (Conditions of Sale), 631 (Protection of Subscriber Privacy), 633 (Unauthorized Reception of Cable Service), and 635(a) (Judicial Proceedings), 47 U.S.C. §§ 542, 545, 546, 547, 551, 553, 555).

In the Telecommunications Act of 1996, Congress again gave careful attention to the interface between federal and non-federal regulation. In Section 601(c) (Federal, State, and Local Law), 47 U.S.C. § 152 nt, Congress explicitly precluded the courts and the Commission from according any implied pre-emptive effect to the Cable Act. Thus, it should be clear why the Commission's interpretations of the Act are not entitled to blanket deference. The Commission does not have either an undifferentiated policy rôle with respect to, or the responsibility to administer, the Cable Act in its entirety. With respect to the dispute over whether SMATV operators are required by Section 621(b) of the Cable Act to obtain a local franchise that gave rise to the Commission's declaratory rule, the Commission has no responsibility – legislative or adjudicatory – with respect to Section 621, which deals with local franchising and it directly appealable to the state or federal courts under Section 635(a).

Consequently, the Commission's attempt to limit the local governments' application of the sections of the Act which Congress has assigned to them must be rejected by this Court. The definitions in Section 602 that the Commission's order purports to interpret affect not only statutory provisions that the Commission administers but also affect the provisions of the Act reserved to the local governments to administer. Congress did not give the Commission the express power to construe those provisions, and certainly not in connection with other sections and

635(a) (Judicial Proceedings), with respect to which it had no administrative jurisdiction.

The majority opinion impliedly seeks to avoid this structural limitation by saying not only that "the agency interpretation is a reasonable one" but that "it is one which we are now convinced we would arrive at ourselves, were we the ones making the original determination." App. A-8. But that interpretation not an interpretation which is any more available to the courts to make than to the Commission for the reasons set forth under Points I and II *ante*.

Conclusion

The decision below is of exceptional importance to subscribers who depend on cable operators to deliver video programming and ancillary transmission services to their homes via cable. The panel accepted by a split vote the agency's determination that a whole class of wireline-based operators may provide cable service without any regulation, in defiance of the comprehensive statutory scheme evolved through successive Congressional enactments over a decade.

Because the Commission's interpretation of the Act raises issues of importance in the inter-governmental administration of the Cable Communications Policy Act of 1984, the Court should grant certiorari to review the decisions below.

Respectfully submitted,

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